United States Court of Appeals

for the Second Circuit

APPELLEE'S REPLY BRIEF

76-5018

To be argued by
RICHARD deY. MANNING

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

In Re

PROVINCIAL REFINING COMPANY LIMITED

and

NEWFOUNDLAND REFINING COMPANY LIMITED,

Bankrupts.

THE CLARKSON COMPANY LIMITED, as Trustee in Bankruptcy, appointed by the Supreme Court of the Province of Newfoundland, of the property of Newfoundland Refining Company Limited and Provincial Refining Company Limited,

Plaintiff-Appellee,

-against-

JOHN M. SHAHEEN, ROY M. FURMARK, ALLEN W. SMITH, PHILIP GANDERT, PETER L. CARAS, PAUL W. [illegible], WILLIAM J. SHERIDAN, and JOHN DOE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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DEFENDANTS' REPLY BRIEF

This Reply Brief is submitted to clarify and elaborate upon Clarkson's right to recognition as Trustee of NRC and PRC by comity and to correct certain misstatements made in the brief by plaintiffappellee ("Appellee's Brief"*).

I. CLARKSON'S RIGHT TO RECOGNITION AS TRUSTEE OF NRC AND PRC BY COMITY

The Appellee's Brief, boiled down to its essence, makes the following points concerning the recognition by the Court below of Clarkson as Trustee of NRC and PRC.

Assuming that Clarkson's appointment as Trustee in bankruptcy of NRC and PRC by the Newfoundland Court resulted from:

(a) a violation of New York Judiciary Law §489;

(b) a violation of the New York forum selection clause in the Agency Agreement; and

(c) a fraudulent affidavit filed by Atlantic Trading as part of a fraudulent conspiracy to breach the Agency Agreement,

the Court below and this Court can or should do nothing whatsoever about it, and must or should recognize Clarkson in the face of such facts.

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* The brief of defendants-appellants will be referred to herein as "Appellants' Brief" and the terms used herein will have the same meanings as used therein. Where emphasis appears in quoted material, it is supplied unless otherwise indicated.

As to the first two points -- violations of Judiciary Law §489 and the forum selection clause -- Clarkson, without denying either allegation, which it has never done in this case, summarily dismisses the allegations made against it in one paragraph of the Appellee's Brief:

> "...While defendants couch their argument in terms of violation of New York public policy as pronounced in New York Judiciary Law §489 and cases dealing with forum selection clauses (Appellants' Br., pp. 23-37) their contention really boils down to a complaint that the Canadian court did not properly apply New York law. Defendants do not dispute that these matters were raised before the Canadian court and adjudicated there."

The basis for this astounding assertion by a supposedly reputable professional bankruptcy company is that the violation of a criminal statute of New York, reflective of a strong public policy, and the violation of a contractual undertaking solemnly entered into, on both of which Clarkson must rest its claims of title here asserted, is not "repugnant to the fundamental notions of what is decent and just...." (Appellee's Brief, p. 25)

It is respectfully submitted that such is not now the law of New York nor has it ever been the law of New York.

The failure of the Court below to pay any heed whatsoever to these grave issues of public policy of the State of New York as well as ignoring the charge of fraud is apparent in

the very language which this Court is being asked to affirm:

> "Under comity, it is conceded[*] I have the power to turn them [the books and records of NRC and PRC] over to a validly appointed trustee, and as far as I am concerned, this is not the court to collaterally attack that appointment. If there is to be such an attack, it is in Newfoundland not before this Court." (A.419)

In one fell swoop, a criminal statute of New York (§489), and the policy of enforcement of solemn contractual undertakings -- both done in and under the laws of New York -- were swept aside.

There can be no better reason than this for the federal courts to pay heed to the language of the Supreme Court, that, where public policy of a state is put in issue, the state courts, not the federal courts, are best equiped to handle the matter:

> "The decree was accordingly vacated and the cause remitted to the state court to the end that the local policy might be made known through the one voice that could declare it with ultimate authority." (Clark v. Williard, 294 U.S. 212-13 (1935))

> "...how far the public policy of the state permitted such recognition [if a claim on behalf of a foreign trustee] was a matter for the State to determine for itself." (Disconto Gesellschaft v. Umbreit, 208 U.S. 570, 580 (1908))**

* Defendants never made any such concession.

**Contrary to the assertion that the Disconto case concerned solely ...the question of whether one state can favor local levying creditors over a...trustee appointed by another state...." (Appellee's Brief, p. 28), the Disconto case involved an action on behalf of a German appointed trustee -- not one appointed by "another state".

Since the Court below appears to have believed that the appointment of Clarkson is not subject to attack in New York, even if it was based upon a violation of Judiciary Law §489 and the New York forum selection clause, and invoked by fraudulent affidavits and was in furtherance of a fraudulent scheme, and since that view is urged on this Court it would appear that a review of the relevant law of New York might cast some light on this subject.

(A) New York Judiciary Law §489

The long standing statute (over forty years on the books) provides:

> "...[n]o corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon...."

The Court of Appeals has held time and again that this statute is expressive of a "time honored public policy" of New York (see the cases cited on pages 24 and 25 of the Appellants' Brief).

More importantly, however, is the fact that Clarkson, whose appointment as Trustee rests on the sole application of Atlantic, and who is nothing more than a representative

of the creditors of NRC and PRC,* must trace its title, the validity of its appointment, through Atlantic -- which acquired all of its interest in the matter in violation of the New York law. Since it is settled in New York that "No person can maintain an action to which he must trace his title through his own breach of the law" (Zindle v. Friedman's Express, Inc., 17 N.Y.S. 2d 594 (App. Div. 1st Dept. 1940)), the Court should not permit Clarkson, as the representative of Atlantic, to do that which Atlantic is barred from doing.

The action of Clarkson, based on a violation of §489, does not differ from that of a New York assignee of claims acquired in violation of that statute, who (assuming valid service can be effected) brings an action in Canada against the debtor and reduces it to judgment, and then brings suit against the debtor on the judgment in New York. Under such circumstances, it is respectfully submitted the judgment would not be enforced under New York CPLR Article 53. CPLR 5303 provides that:

> "Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive...."

*"...Upon the appointment of the trustee and the adjudication in bankruptcy, it is true that title to assets passes to the trustee, but it is for the benefit of the bankrupt and his creditors. The trustee has no rights of his own if we eliminate his fees...." (Van Der Stegen v. Neuss, Hesslein & Co., 270 N.Y. 55, 59 (1936))

Section 5304(b)(4) provides:

> "(b) Other grounds for nonrecognition. A foreign country judgment need not be recognized if:
>
> "....
>
> "4. The cause of action on which the judgment is based is repugnant to the public policy of this state."

Of course, CPLR Article 53 (enacted in 1970) is limited to foreign money judgments, but it is clearly expressive of the manner that New York Courts are to review foreign Court actions.

Contrary to the decision of the Court below, it is the New York Courts, not the Newfoundland Court that should review the attack on the appointment of Clarkson.

This Court has had an opportunity to review CPLR Article 53 and has recognized its impact on foreign judgments which violate New York public policy (Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (1973)); the opinion went to great lengths to explain why the foreign action (arbitration decison) there involved did not constitute a violation of New York's public policy. This Court certainly did not hold that a New York Court should not look into the question of New York public policy as it was affected by the decision of the foreign tribunal.

It is respectfully submitted that the facts here presented could not stand up to the same judicial scrutiny as was applied in the Solitron case.

Admittedly, the New York Courts cannot tell the Canadian Court how to conduct its business, but where the Trustee appointed by the Newfoundland Court comes to New York and invokes the jurisdiction of the New York Court, such Court is required, by all principles of justice and what is decent to bar him if his title rests on a violation of a New York criminal statute expressive of a strong public policy of the State of New York.

Moreover, where an issue of Judiciary Law §489 is raised, it cannot be decided on a summary record based on affidavits, but all relevant facts must be examined (Fairchild Hiller Corp. v. McDonald Douglas Corp., 28 N.Y. 2d 325 (1971)).

One needs only to look to the assignment to Atlantic of the claims on January 30, 1976, followed in two weeks by the institution of the proceedings in Canada, which culminated in Clarkson's appointment as Trustee, to find at the least, a case of res ipsa loquitur. To suggest that on January 30, 1976, Atlantic did not have any idea it was going to institute bankruptcy proceedings against NRC and PRC in two weeks is absurd on its face -- the legal research and preparation of documents in a $500 million dollar bankruptcy takes longer than that.*

* Certainly Clarkson must be aware of the implications of Judiciary Law §489 and the difference between an assignment to Atlantic solely of claims against NRC and PRC and the assignment of a going business as was involved in Fairchild Hiller, and the difference between the two year negotiation period in Fairchild Hiller, and the two week period involved here. Clarkson's Counsel is very familiar with the Fairchild Hiller decision, as it was involved in the case.

(B) The Forum Selection Clause

As pointed out above, the Appellee's Brief (p. 25) dismissed, in one paragraph, the violation of §489 of the Judiciary Law and the breach of the Agency Agreement's undertaking that "a New York Court" was to resolve all disputes thereunder, on the ground that if the Canadian Court improperly applied the law of New York, that ends the matter.

As pointed out in the Appellants' Brief, since as early as 1931 the New York Courts have established the principle that

> "Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced....Courts should endeavor to keep the law at a grade at least as high as the standards of ordinary ethics...." (Gilbert v. Burnstine, 255 N.Y. 348, 354-55 (1931))

Again, in making foreign money judgments "conclusive" in New York by the enactment in 1970 of Article 53 of the CPLR, the legislature gave to the Courts a clear indication of its views on forum selection clauses and those who violate them. There is a specific exception made with respect to foreign judgments obtained in violation of a forum selection clause:

> "....a foreign country judgment need not be recognized if...the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court...." (CPLR §5304(b)(6))

In the face of this, Clarkson, the company that has been in the business of bankruptcy trusteeship for more than 100 years, urges this Court that it should not -- indeed cannot -- examine Clarkson's credentials which are solely predicated upon the application of Atlantic, every claim of which arose under the Agency Agreement (also assigned to Atlantic) which contained the following provision:

> "X) This agreement shall be construed in accordance with the laws of the State of New York and any dispute arising between the parties shall be submitted for determination by a New York court."

Clarkson does tenaciously endeavor to hold on to its job!

(C) Last, And Certainly By No Means Least, The Issue Of Fraud

The Appellee's Brief nowhere denies defendants' allegations that

(a) the Application of Atlantic on which Clarkson's appointment was based, was upon blatant perjury (see A. 163); and

(b) Clarkson was a co-conspirator with a number of other parties, including Atlantic, the purpose of which was to breach the Agency Agreement, relieve Ataka America of its obligations thereunder and throw NRC and PRC into bankruptcy (incidentally, getting Clarkson this choice "plum" -- the trusteeship in a $500,000,000 bankruptcy).

What the Appellee's Brief does do, is to defend on the ground that:

(a) no proof was offered of the fraud -- which is not accurate;

(b) the fraud was "intrinsic" not "extrinsic", and thus beyond the legitimate interest of this Court, which is not a correct statement of New York law; and

(c) Clarkson's being named as a defendant co-conspirator in several state court actions commenced prior to Clarkson's being named trustee in bankruptcy, somehow mitigates the charge that Clarkson is involved in the fraud charged against it, which is absurd.

(1) Proof of The Fraud Alleged

Of course, one of the prime and essential elements of a successful fraudulent scheme is secrecy. Most of the facts surrounding a carefully designed fraudulent scheme must be extracted with all the skill and force involved in extracting an impacted molar. And, in this case, the shroud of secrecy has been unbelievable, but a "tip of the iceberg" of fraudulent conspiracy and mendacity has shown through.

There is evidence in the record that, on January 5, 1976, there was in existence a "Project Winnett" (A. 177), the purpose of which was then not known. It is now clear that one of the purposes of "Project Winnett" was the sur-

reptitious ex parte application of Atlantic for the bankruptcy of NRC and PRC and the appointment of Clarkson as Interim Receiver thereof.

Who were the participants in Project Winnett? Defendants do not know all of them; it is known, however, that Clarkson

(a) knew in advance of Atlantic's ex parte application to the Newfoundland Court, and

(b) was sufficiently sure that the Court would appoint Clarkson as Interim Receiver on Atlantic's Application to be poised in New York like a vulture which "pounced" on the office of NRC and PRC after the Order was signed in Newfoundland (A. 179).

Why was "Project Winnett" necessary? Defendants do not know all of the reasons, but it is known that

(a) Ataka America Inc. was bound by an Agency Agreement with NRC and PRC (A. 171);

(b) that the Agency Agreement imposed an obligation on Ataka to finance all purchases of crude oil required for the PRC refinery and there was no effective "escape" open to Ataka from that obligation (A. 137-143);

(c) the Agency Agreement provided that "any dispute" thereunder was to be submitted to "a New York Court" (A. 176); and

(d) that Ataka wanted to be relieved of its obligations under the Agency Agreement [otherwise why did it not continue performing the Agreement?] and had no intention whatsoever of honoring its commitment to submit all disputes thereunder to a New York Court [as indeed it has not].

For these reasons it assigned the claims to Atlantic and Atlantic then brought the Canadian bankruptcy proceedings thereon.

If fraud was not involved, why was there such secrecy? If NRC and PRC really owed the money to Ataka, what could they have done about it other than invoke the jurisdiction of the New York Courts to which Ataka had agreed.

One only has to compare all of the advance publicity given to the decision to invoke the bankruptcy court's jurisdiction over W. T. Grant and Penn Central with the secrecy of "Project Winnett" to question the bona fides of the participants in "Project Winnett".

To this date Clarkson has avoided any mention whatsoever of "Project Winnett". One wonders, why not?

One final word on the proof or lack thereof. No opportunity whatsoever was given for the presentation of "proof" on the question of fraud; the Court below simply assumed that there had been no fraud or that the question was irrelevant. Nowhere in the record was any effort made

by the Court below to examine the charge of fraud. And, when counsel started to argue the point of the New York connections with this case, contrary to the factually incorrect argument made by Clarkson's counsel below that the matter involved a Japanese company (neither Ataka America the assignor, or Atlantic, the assignee of the claims brought against NRC and PRC, is a Japanese company), counsel was summarily silenced by the Court below and not permitted to argue that point. The Court stated that "that's not going to help me" (A. 409).

(2) The Fraud Charges Was "Intrinsic" Rather Than "Extrinsic" And Thus Beyond The Legitimate Interest Of This Court

The Appellee's Brief asserts on page 22 that

> " 'the fraud' which must be shown in order to permit a collateral attack on a foreign judgment is extrinsic fraud, e.g., fraud which results in the obtaining of jurisdiction over the defendant or fraud which deprives an adversary of the opportunity to make a full and fair defense."

Citing Tamimi v. Tamimi, 38 App. Div. 2d 197, 328 N.Y.S. 2d 477 (2nd Dept. 1972).

While the opinion in Tamimi appears to preserve the now archaic distinction between "intrinsic" and "extrinsic" fraud in the procurement of a foreign judgment, its learned discussion must be recognized as obiter, because the Court refused to recognize the foreign judgment, classifying the fraud as "extrinsic", which the Court clearly recognized as a basis for such nonrecognition.

There is no indication that any of the changes in the New York law mentioned below were called to the attention of the Court.

The argument in Appellee's Brief that the fraud charged in the Canadian bankruptcy was "intrinsic" rather than "extrinsic" (as well as the opinion of the Appellate Division in Tamimi) ignores the change in the New York law effected by Section 5015(a)(3) of the CPLR dealing with New York judgments and thereafter in 1970 by the addition of Article 5301 et seq of the CPLR dealing with foreign money judgments. Both represent clear expressions of the policy of New York as expressed by the legislature.

The elimination of the distinction between "intrinsic" and "extrinsic" fraud with respect to New York judgments has beyond question been made (footnotes omitted):

> "Although CPLR 5015(a)(3) does not so specify, as does Federal Rule of Civil Procedure 60(b)(3), the Advisory Committee's notes make it clear that the fraud forming the basis for relief from a judgment may be either extrinsic or intrinsic. The new provision thus rejects the decisions under prior law that limited the impeachment of a verdict to fraud that was extrinsic to the case itself. The purported distinction was between fraud in the presentation or the subject matter of the case (intrinsic) and fraud that prevented a party from presenting his case adequately (extrinsic). The distinction proved to be shadowy and uncertain of application, and has been discarded from New York practice as it was from federal practice.

> "Elements of fraud that under prior law were considered to be intrinsic and not sufficient for relief under CPLR 5015(a)(3), include perjury, misrepresentation of the merits and validity of a defense, conspiracy to name as plaintiff a person who was not the real party in interest, and even fraud, when it is concealed, in the underlying transaction that is the subject of suit." New York Civil Practice, Weinstein, Korn & Miller, ¶5015.09

See also 3 N.Y. Adv. Comm. Rep. 204 (1959) ("the 'fraud' specified in subparagraph 3 may be either extrinsic or intrinsic".)

There is certainly no reason whatsoever for granting a foreign bankruptcy order more favorable standing in New York than the standing granted a judgment by a New York Court.*

With respect to foreign money judgments, the law is equally clear. In the excellent study prepared by Ms. Barbara Kulzer for the Judicial Conference of New York, on the "Uniform Foreign Money Judgments Recognition Act" (republished in 18 Buffalo L.R. 1 (1968-69)), which was the basis for the enactment of Article 53 of the CPLR, the subject of fraud as a basis of nonrecognition of a foreign money judgment was explained as follows (footnotes omitted):

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*"The issue of fraud in procuring the judgment rarely presents problems. If either the recognizing or the rendering jurisdiction permit such challenges to its domestic judgments, the challenge [to the foreign judgment] should be heard." Recognition of Foreign Adjudications: A Survey and Suggested Approach, 81 Harv. L.R. 8 (1968).

"B. The judgment was obtained by fraud. This section is clearly in accord with New York law which has consistently regarded fraud as a ground for nonrecognition. However, it has in the past been understood that only extrinsic fraud was available as a defense. Extrinsic fraud deprives the aggrieved party of an adequate opportunity to present his case to the court, while intrinsic fraud involves matters actually passed upon by the first court. The Act makes no such distinction, which is consistent with the current trend. New York has taken a similar approach in the CPLR with respect to domestic judgments. The omission of any distinction between extrinsic and intrinsic fraud has been authoritatively interpreted as permitting both kinds to be a basis for relief: 'The distinction proved to be shadowy and uncertain of application, and has been discarded from New York practice as it was from federal practice.' Acts of fraud previously regarded as insufficient to vacate a judgment--prejury misrepresentation of the merits and validity of a defense, conspiracy to name as a plaintiff one not the real party in interest, and concealed fraud in the transaction that is the subject of the suit--would now presumably give rise to relief.

"This brief review of current law on fraud in domestic judgments is important, because with respect to the various defenses to recognition of foreign judgments, American courts may depart from the standards of full faith and credit as applied to sister state judgments. The question of fraud will almost certainly be decided under the law of the second state rather than the first, because 'it seems unlikely that an American court would permit the issue of fraud to be settled conclusively by a foreign law which might be based upon conceptions of fairness and justice at substantial variance with those prevailing in this country.' Although it has been held that when the foreign court actually passed on the question of fraud, that issue would not be reexamined on the merits, the contrary view has been pressed. In any event, since intrinsic fraud is now cause for relief

> from local judgments, foreign country judgments are likely to be refused recognition on the same ground."

See also, New York Civil Practice, Weinstein, Korn & Miller, ¶5304.02.

Even if the archaic distinction between "extrinsic" and "intrinsic" fraud is applied, the record below is quite clear that the charge was made, and supported by documents in the record (A. 163) that the Canadian Bankruptcy Court could have acquired no jurisdiction whatsoever over the two alleged bankrupt corporations, without the fraudulent affidavit of Atlantic and without Atlantic's violation of §489 of the New York Judiciary Law and the forum selection clause, with which Clarkson (not in its capacity as Trustee, but in its prior capacity as a corporate entity, and later as Receiver and Interim Receiver) was an active co-conspirator.

(3) Clarkson's Role As A Defendant In Several Actions Brought By Or On Behalf Of NRC and PRC

Appellee's Brief contains the following statement (p. 24):

> "Certainly the fact that the Shaheen group has named the trustee in a lawsuit is neither reason to deny the trustee power to act on behalf of the estates the Newfoundland Court appointed it to represent nor evidence of fraud."

The record below will show that Clarkson was not named as defendant in the litigation "as trustee" but, rather was named as The Clarkson Company Limited, a Canadian corporation

(A. 133), in its private corporate capacity and in its capacity as Receiver under the First Mortgage (A. 167), Receiver under the Second Mortgage (A. 167), Receiver under the First, Second and Third Debentures (assigned to Atlantic) (A. 162), and Interim Receiver on the application of Atlantic (A. 163). The point is that Clarkson, a Canadian corporation, was engaging in a fraudulent conspiracy -- the end result of which was to put NRC and PRC into bankruptcy in order to relieve Ataka America and Ataka Japan of their contractual obligaions, and to violate a forum selection clause stating that any dispute thereunder (necessarily including any disputes regarding debt issued thereunder, see N.Y. Uniform Commercial Code, §3-119; U.S. v. Novsam Realty Corp., 125 F. 2d 456 (2nd Cir. 1942)) was to be decided by "a New York Court."

Clarkson's multifaceted role in this conspiracy was essential; if it "blew the whistle" on Atlantic the "game was up". Clarkson, in its capacity as Trustee, is understandingly desirous of brushing its other roles "under the carpet." In this respect, a review of all the events which occurred on February 13, 1976, and thereafter, and Clarkson's role in each is quite enlightening (A. 162-167).

(II) CORRECTION OF CERTAIN MISSTATEMENTS

The Appellee's Brief (page 6; bottom of the page) states:

> "...the Shaheen group had filed at least four actions attempting to upset the Canadian bankruptcy."

In support of that statement, for which no record reference is made, is a footnote in which four citations are given. There is no support whatsoever in the record below for this reference and the characterizations of the cases mentioned are so distorted as to require correction.

The first case, Newfoundland Refining Company Limited et ano. v. Ataka America Inc. (76 Civ. 941 (S.D.N.Y.)), was brought against Ataka America, Inc., Ataka & Co. Ltd., Atlantic Trading (Delaware) Inc., and The Sumitomo Bank, seeking to enforce by injunction the New York forum selection clause of the Agency Agreement, for damages for the breach of the Agency Agreement and interference therewith by Sumitomo Bank; and for conversion of plaintiffs' funds; the case was "voluntarily dismissed by plaintiff" for one reason only, that is, Atlantic obtained an ex parte injunction from the Canadian Court enjoining the two plaintiff corporations from proceeding further with the case. It was Atlantic and Clarkson who feared the hearing before, and the decision of, Judge Motley, not the Shaheen group.

The second case, Provincial Refining Company, et ano. v. Kleinwort Benson Ltd., et ano. (Supreme Court, New York County, Index No. 03740/76), [the "et ano." defendant whose name is not stated, is Clarkson] did not in any way seek to "upset the Canadian bankruptcy' but dealt entirely with the nonjudicial appointment of Clarkson as Receiver by the holder of the First Mortgage on the refinery.

The third case, Provincial Refining Company Limited, et ano. v. The Province of Newfoundland, et ano. (Supreme Court, New York County, Index No. 03960/76), [the "et ano." defendant whose name is not stated, is Clarkson] similarly had nothing whatsoever to do with an attempt to "upset the Canadian bankruptcy" as it had to do with the appointment of Clarkson as a receiver under the Second Mortgage, a non-judicial action.

The fourth case, SNR Holding Company Inc. as sole stockholder of Newfoundland Refining Company Limited and Provincial Refining Company Limited, v. Ataka America, Inc., et al, (Supreme Court, New York County, Index No. 03959/76), [the "et al" includes Clarkson] similarly did not seek to "upset the Canadian bankruptcy" but was essentially the same complaint as that filed in the first case cited above (although additional defendants, including Clarkson, were named); after discontinuing the Federal Action, this action

was commenced in the state court as a derivative action by the parent company of the two Canadian companies, which parent company was not subject to the jurisdiction of the Canadian Court nor subject to the injunction issued by it against NRC and PRC. The action was for the same relief sought in the Federal Action plus certain additional relief.

All of the four cases were filed before March 12, 1976, the date of adjudication by the Newfoundland Court that NRC or PRC were bankrupt. Consequently, none of these cases could be properly described as having been instituted or filed for the purpose of "attempting to upset the Canadian bankruptcy"; they did seek unsuccessfully to enjoin the defendants from participating therein in violation of the New York forum selection clause in the Agnecy Agreement.

At the bottom of page 6 and carrying over to the top of page 7 of Appellee's Brief is the statement that:

> "The trustee properly regarded the refusal of the defendants to give it even access to the books and records of PRC and NRC as but another part of their continued attempt to avoid the proper administration of the estates."

There is no record reference to this statement for the reason that there is nothing in the record to support it. In fact, the statement on page 5 of Appellee's Brief controverts the above quoted statement:

> "...During the period between its appointment as Interim Receiver (February 13, 1976) and its appointment as trustee [March 12, 1976], defendants gave Clarkson limited access to the books and records of PRC and NRC."

Even that descripton is grossly inaccurate. Reference to the voluntary agreement under which Clarkson was given access to the books and records of NRC and PRC (A. 113) discloses that Clarkson was given <u>total</u> access to the books and records; what Clarkson complained of to Judge Owen, below, was the the "total access" to which it claims it was denied was that the books and records were made available only during normal working hours, i.e., 9 a.m. to 5 p.m., Monday through Friday (A. 249).

Appellee's Brief, page 8, states (footnote):

> "No motion to stay the proceedings had been made by the defendants in the District Court."

Reference to the transcript of the hearing belies that statement; defendants sought a stay from the Court pending an appeal to this Court which was granted until noon the next day (A. 424-5).

Subpoint I (B) (pp. 16-18) of the Argument in Appellee's Brief, deals with the "finding" of the Court below; suffice it to say that as pointed out in the Appellants' Brief (pp. 11-13) there was <u>no evidence whatsoever</u> to support the finding of the Court concerning the "enormous risk of irreparable injury"; the fact that Judge Owen expressed on the

record his "recollection" of the ex parte statement of defendant's counsel (Appellee's Brief, p. 17), does not in any way constitute evidence upon which to base such a finding.

In the same connection, on page 17 of the Appellee's Brief, there is a statement that:

> "....there is no dispute that defendants did attempt to use a restraining order secured from the New York State Supreme Court to block compliance with Judge Owen's order."

No record reference is given nor can one be given because the only place this issue came up is before Judge Owen and there was a considerable amount of disagreement on the point (A. 407-409).

Appellee's Brief (page 28) states:

> "By memorandum decision dated April 9, 1976, Justice Tyler recognized Clarkson as trustee under the principles of comity...."

There is, of course, nothing in the record to support that statement, since Judge Tyler's memorandum decision was issued after the proceedings below had been concluded. A copy of Judge Tyler's memorandum decision is annexed hereto as Exhibit A, and it will be clearly seen that all Justice Tyler did was to avoid an open confrontation with the federal court. Judge Tyler's previously granted injunction against Clarkson acting as trustee (A. 253) indicates Judge Tyler's real reaction to Clarkson being granted any rights as a trustee under principles of comity.

Justice Tyler's action, as well as the decision below, was, of course, at total variation with all of the rules governing state/federal relationships from Erie Railroad v. Tompkins, 304 U.S. 64 (1938) down to the present date (cf. Bradley v. General Motors Corp., 512 F. 2d 602 (6th Cir. 1975)).

This necessarily involves the question of "abstinence" by the federal courts in determining matters of state law.

It is respectfully suggested that the statutory scheme of Judiciary Law §489 as it relates to a "significant state policy" is no less important -- especially where $350,000,000 is involved -- than the usury laws of New York, as to which this Court recently recognized that "abstinence" might have been the preferred course. See Brown v. First Nat. City Bank, 503 F. 2d 114, 117 (2nd Cir. 1974) ("Since...only state law questions were presented the district court could, and probably should, have postponed its decision until Brown's claim was presented to and adjudicated by the courts of New York....[as] there was the danger that the district court was frustrating a significant state policy...."). See also St. Paul Mercury Ins. Co. v. Price, 329 F. 2d 687 (5th Cir. 1964) and cases there cited. Certainly the state law in the instant case is as "clear" as this Court found it to be in Brown; but "clear" in a manner contrary to the decision below.

Should not this Court consider why Clarkson, already in the New York courts seeking comity as Trustee, came "across the street" to try for the same recognition in connection with the books and records of the subject companies? Cf. Rosenfeld v. Black, 445 F. 2d 1337, 1341, fn 5 (2nd Cir. 1971) ("a litigant is entitled to his day in one court, but not in two....")

In closing, it is respectfully submitted that the Court might consider the following questions:

1. If Clarkson was not involved in "Project Winnett" and its apparent objective of fraudulently relieving Ataka America from its obligations under the Agency Agreement, and

2. If Clarkson is a reputable company merely carrying out its businesses as a bankruptcy trustee,

why is it defending the actions of Ataka America and Atlantic (supposedly just creditors of the bankrupt corporations) and not demanding that all relevant facts be brought to light, so that its valued name and reputation as a fiduciary can be shown to be as above suspicion "as Caesar's wife"?

Respectfully Submitted,

MANNING, CAREY & REDMOND
Attorneys for Defendant-Appellants
122 East 42nd Street
New York, New York 10017
212 867-1040

Richard deY. Manning
Of Counsel

HGc

Exhibit A

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

SHR HOLDINGS, INC. as sole stockholder of NEWFOUNDLAND REFINING COMPANY LIMITED and PROVINCIAL REFINING COMPANY LIMITED,

Plaintiffs,

-against-

Index No. 3959/76

ATAKA AMERICA, INC., ATAKA & CO., LTD., ATLANTIC TRADING (DELAWARE) CORP., and THE SUMITOMO BANK LTD.,

Defendants.

TYLER, J.:

Plaintiff has moved this Court by order to show cause for several forms of relief, including punishment of the defendants and the attorneys for some of the defendants for their alleged contempt of a prior order of this Court and partial summary judgment in the amount of $11,100,000.00. Additionally, the defendant Clarkson Company Limited has moved this Court pursuant to CPLR 1017 for an order substituting it as the plaintiff herein in its capacity as trustee in bankruptcy for Provincial Refining Company Limited and Newfoundland Refining Company Limited.

A review of this case must begin with the recognition by this Court of a decision by the United States District Court

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for the Southern District of New York in another case between these parties whereby the aforementioned Clarkson Company Limited was recognized as the trustee of Provincial Refining Company Limited and the Newfoundland Refining Company Limited. This decision, which was rendered on April 1, 1976, also directed that the plaintiffs herein turn over all books and records of Provincial and Newfoundland to Clarkson. The plaintiffs herein appealed that determination, and in a decision dated April 6, 1976, the United States Court of Appeals for the Second Circuit denied that application.

It is clear that the factual and legal circumstances in this case have been drastically altered since the point that this motion was submitted to this Court. It is the view of this Court that the case at bar does not present issues which would warrant conflicting decision between the state and federal courts. In this instance, the determination of issues by the federal district court and the court of appeals will be controlling, and the issues presented for determination herein shall be disposed of accordingly.

Therefore, it is the decision of this Court to vacate the temporary restraining order issued by this Court on March 24, 1976 and to deny the plaintiffs' motion for a preliminary injunction. Further, the motion by the defendant Clarkson Company Limited to be substituted as the plaintiff herein in its capacity

as trustee in bankruptcy is granted, and plaintiffs' motions for partial summary judgment and for orders finding the defendants herein in contempt of court are denied.

Settle order.

Dated: April 9, 1976.

J. S. C.

Two Copies Rec'd
June 28, 1976
White Lake